

NO. 42680-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

BRODERICK HAGSETH,

Appellant,

K

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

KAY A. GERMIAT
Assistant Attorney General
WSBA No. 18532
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
(253) 593-5243

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF ISSUES.....2

III. COUNTERSTATEMENT OF THE CASE2

 A. Procedural History2

 B. Mr. Hagseth’s Work History And Relationship To
 Employment.....3

IV. STANDARD OF REVIEW.....7

V. SUMMARY OF THE ARGUMENT.....8

VI. ARGUMENT9

 A. RCW 51.08.178(2) Applies To Set Mr. Hagseth’s Wage
 Rate As He Is A Part-Time Or Intermittent Worker.....9

 B. Even When The Facts Of This Case Are Considered In A
 Light Most Favorable To Mr. Hagseth, He Cannot
 Establish That His Relationship To Employment Is Full-
 Time And Continuous Applying the *Avundes* Test14

 1. The Nature Of The Employment Was Temporary
 And Intermittent15

 2. Mr. Hagseth Did Not Manifest An Intent To Work
 Full-Time.....17

 3. Mr. Hagseth’s Relationship to the Current
 Employment Was That Of A Temporary Assignment
 Where His Hours Fluctuated18

 4. Mr. Hagseth’s Work History Is That Of A Part-Time
 Or Intermittent Worker.....19

C. Under The Definition Of Intermittent, RCW 51.08.178(2) Applies to Mr. Hagseth.....	20
D. The Rule Of Liberal Construction Does Not Apply To This Case.....	22
VII. CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Brown v. Superior Underwriters</i> 30 Wn. App. 303, 632 P.2d 887 (1980).....	8
<i>Cockle v. Dep't of Labor & Indus.</i> 142 Wn.2d 801, 16 P.3d 583 (2001).....	22
<i>Cyr v. Dep't of Labor & Indus.</i> 47 Wn.2d 92, 286 P.2d 1038 (1955)	23
<i>Dep't of Labor & Indus. v. Granger</i> 159 Wn.2d 752, 153 P.3d 839 (2007).....	4
<i>Dep't of Labor & Indus. v. Avundes</i> 140 Wn.2d 282, 996 P.2d 593 (2000).....	passim
<i>Ehman v. Dep't of Labor & Indus.</i> 33 Wn.2d 584, 206 P.2d 787 (1949)	23
<i>Harris v. Dep't of Labor & Indus.</i> 120 Wn.2d 461, 843 P.2d 1056 (1993).....	22
<i>Hawkins v. Diel</i> 166 Wn. App. 1, 269 P.3d 1049 (2011).....	7, 8
<i>Hudson v. United Parcel Serv., Inc.</i> 163 Wn. App. 254, 258 P.3d 87 (2011).....	21
<i>In re Deborah Guragna (Williams)</i> BIIA Dec. 90 4246, 1992 WL 117946 (1992).....	13
<i>In re Pino</i> BIIA Dec. 91 5072 & 92 5878, 1994 WL 144956 (1994).....	10, 14, 20
<i>In re Richard Brixey</i> BIIA Dckt. 02 14516, 2003 WL 22696970 (2003).....	15

<i>Rogers v. Dep't of Labor & Indus.</i> 151 Wn. App. 174, 210 P.3d 355 (2009).....	7
<i>Sing v. John L. Scott, Inc.</i> 134 Wn.2d 24, 948 P.2d 816 (1997).....	8
<i>Strmich v. Dep't of Labor & Indus.</i> 31 Wn.2d 598, 198 P.2d 181 (1948).....	8
<i>Watson v. Dep't of Labor & Indus.</i> 133 Wn. App. 903, 138 P.3d 177 (2006).....	17

Statutes

RCW 51.08.178	9, 10, 12
RCW 51.08.178(1).....	passim
RCW 51.08.178(2).....	passim
RCW 51.08.178(2)(b).....	11, 14
RCW 51.12.010	22, 23
RCW 51.52.115	7
RCW 51.52.140	7
RCW Title 51.....	1

I. INTRODUCTION

This case arises under RCW Title 51, the Industrial Insurance Act. Broderick Hagseth appeals from a Lewis County Superior Court order granting judgment as a matter of law to the Department of Labor and Industries (Department). The court decided that no reasonable jury could find that Mr. Hagseth's relationship to employment was that of a full-time, continuously-employed worker, and thus Board of Industrial Insurance Appeals (Board) and Department were correct to calculate his wages under RCW 51.08.178(2), and not RCW 51.08.178(1).

Mr. Hagseth worked sporadically for Express Personnel Services, working less than full-time employment. Mr. Hagseth's appeal should be denied because he failed to produce any credible evidence that his relationship to employment was that of regular continuous gainful employment, rather than essentially part-time or intermittent. Even assuming Mr. Hagseth intended to be employed on a full-time basis, the test required by *Department of Labor & Industries v. Avundes*, 140 Wn.2d 282, 996 P.2d 593 (2000), supports the superior court's decision that Mr. Hagseth's relationship to employment was part-time or intermittent. The Court should therefore affirm the superior court's grant of judgment as a matter of law to the Department.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the superior court correctly decided the Department was entitled to judgment as a matter of law that Mr. Hagseth's relationship to his employment of injury, and all employment in general, was that of a part-time or intermittent worker.

III. COUNTERSTATEMENT OF THE CASE

A. Procedural History

Mr. Hagseth sustained an industrial injury on January 31, 2005, while in the course of his employment with Express Personnel Services, Inc. BR Hagseth at 13.¹ At the time of his injury, Mr. Hagseth was assigned to work as a lumber grader at Adams Lumber, where he began his assignment on December 27, 2004. BR Hagseth at 7.

The Department allowed his claim. The Department then issued a series of wage rate orders that were protested by either the employer or Mr. Hagseth. BR at 3. The Department then issued an order that set Mr. Hagseth's wages by averaging his previous twelve months of earnings on April 9, 2008. BR at 60. This order was protested by Mr. Hagseth. BR at 57-62. On July 31, 2008, the Department affirmed

¹ BR refers to the Certified Appeal Board Record provided by the Board. The Department will refer to documents in the administrative record by reference to machine-stamped numbers supplied by the Board, except when reference is to witness testimony, when the Department will give the name of the witness and the page number in the transcript for that witness.

the wage rate order of April 9, 2008. BR at 60. Mr. Hagseth appealed to the Board. BR at 57-59.

On June 23, 2009, a Board judge issued a proposed decision and order affirming the Department's wage rate order. BR at 23-28. Following a petition for review from Mr. Hagseth, the full Board issued a decision and order that affirmed the Department's wage rate order. BR at 2-5.

Mr. Hagseth appealed to Lewis County Superior Court. CP at 1-8. The Department filed its motion for judgment as a matter of law, which the superior court granted. CP at 38-41. Mr. Hagseth's appeal to this Court followed.

B. Mr. Hagseth's Work History And Relationship To Employment

In 1991, Mr. Hagseth began working in an on-and-off capacity with Express Personnel Services, Inc., a staffing service that provides workers for clients to fill positions that they have open for a temporary period of time. BR Hagseth at 5; BR Rayan at 35; BR Ex. 3.²

Mr. Hagseth's work history with the Express Personnel Services was as follows:

² Express uses .14 week to describe a job that lasted 1 day (1÷7). BR Rayan at 37. Their records include the client's name, the date the job starts and its expected end date, the date the job actually ended, and the reason for the end of the job. BR Rayan at 37.

1994: 1 day
1995: --
1996: 4 weeks, 3 days on 2 assignments
1997: 7 days on 2 assignments
1998: --
1999: 1 week, 3 days on 2 assignments
2000: --
2001: --
2002: --
2003: approx. 39 weeks on 11 assignments
2004: approx. 3 weeks plus 30 work days on 16 assignments
2005: approx. 5 weeks on job of injury³

BR Rayan at 36-40; BR Ex. 2; BR Ex. 3.

For the five years preceding his injury, Mr. Hagseth's work history, according to Employment Security records (BR Ex. 1), was as follows:

2000: 811 hours:⁴
 NW Forest Fibre Products (742);
 Fred B. Moe Logging (61);
 Express Personnel Services (8).
2001: 798 hours:
 Kelly Services (260);
 NW Forest Fibre Products (98);
 Gloyd W. Neilson (222);
 T and M Ranch (165);
 Michael Gloyd Neilson (53);
2002: 1,085 hours for Kelly Services;
2003: 1,017 hours Express Personnel Services;
2004: 218 hours for Express Personnel Services.

³ Post-injury hours are not included as wages are calculated "at the time of injury." RCW 51.08.178(1); *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 759, 153 P.3d 839 (2007).

⁴ Full time employment is 2000 hours (40 hours/week x 50 weeks).

The most hours Mr. Hagseth worked in any one quarter were 478 hours in the third quarter of 2002. BR Ex. 1. The longest Mr. Hagseth has worked for any one employer was with Northwest Forest Fibre Products, Inc. in 2001. BR Hagseth at 17.

In 2004, his employment was exclusively through Express Personnel Services, and totaled 218 hours. BR Ex. 1. Express Personnel Services' records indicate that Mr. Hagseth worked approximately 45 days in 2004. BR Ex. 3. As his total hours were only 218, these included full time and part time days. BR Ex. 3. This was done in 16 assignments of varying lengths:

Jan. 1-9:	Foseco Metallurgical, Inc. Client dissatisfied with worker
Jun. 1:	Symons Frozen Foods
Jun. 8:	Symons Frozen Foods
Jun. 9:	Weiss Cascade
Jun. 22:	Symons Frozen Foods
Jun. 29:	Weiss Cascade
Jul. 2-10:	Symons Frozen Foods
Jul. 13:	Weiss Cascade
Jul. 17-21:	Symons Frozen Foods
Jul. 23-24:	Symons Frozen Foods
Jul. 26-Aug. 4:	Symons Frozen Foods; Client dissatisfied with worker
Aug. 20-Sep. 10:	Weiss Cascade
Sep. 20-24:	Weiss Cascade
Nov. 8:	Weiss Cascade
Dec. 27-Jan. 31:	Adams Lumber; Client dissatisfied with worker

BR Ex. 3.

On December 27, 2004, Express Personnel Services sent Mr. Hagseth to Adams Lumber, where he was injured on January 31, 2005. BR Hagseth at 7, 13. According to the payroll records, Mr. Hagseth's work pattern at Adams Lumber was as follows:

Dec. 27-Jan. 2: 19.5 hours
Jan. 3 – Jan. 9: 40.5 hours
Jan. 10-Jan. 16: -0- hours
Jan. 17-Jan. 23: 42.5 hours
Jan. 24-Jan. 30: 34 hours
Jan. 31-Feb. 6: 8 hours (the week of his injury).

BR Ex. 4 (payroll records).

Mr. Hagseth acknowledged that not all jobs to which Express Personnel Services sent him required him to work full time, or forty hours per week. BR Hagseth at 6. Mr. Hagseth neither applied for nor received unemployment benefits from January 2000 through January 2009. BR Ex. 1.

Adams Lumber used Express Personnel Services for temporary workers when Adams Lumber opened the mill in Centralia; if the workers met Adams Lumber's standards, the company would consider hiring them full-time. BR Floyd at 27. There were no promises of guaranteed employment made to the Express Personnel Services employees by Adams Lumber. BR Floyd at 28.

Mr. Hagseth testified that he hoped to become a full-time permanent employee for Adams. BR Hagseth at 6. Mr. Hagseth testified that his supervisor, Francisco Vargas, said he planned to hire Mr. Hagseth. BR Hagseth at 12-13.⁵ Mr. Vargas testified that he did not remember Mr. Hagseth expressing an interest in being a permanent employee for Adams, and that he did not think the company was going to hire him because he did not meet their standards. BR Vargas at 22, 24. Although the company required the workers to pick up five boards at a time, Mr. Hagseth routinely picked up only two. BR Vargas at 22-23, 24.

IV. STANDARD OF REVIEW

The superior court reviews a Board decision de novo on the record developed at the Board. RCW 51.52.115. This Court's review of the superior court decision is under the ordinary standard for civil cases. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

An appellate court reviews a ruling on a CR 50 motion for judgment as a matter of law de novo. *Hawkins v. Diel*, 166 Wn. App. 1, 269 P.3d 1049, 1055 (2011). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the non-moving party, the court can say, as a matter of law, there is no

⁵ This assertion did not come in to state the truth of the matter asserted; its use was limited to demonstrate Mr. Hagseth's state of mind. BR Hagseth at 13.

substantial evidence or reasonable inference to sustain a verdict for the non-moving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Substantial evidence exists where there is sufficient evidence to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

In considering a motion for judgment as a matter of law, the court treats the non-moving party’s evidence as true and draws all reasonable inferences from that evidence. *Hawkins*, 269 P.3d at 1055. The court may grant judgment as a matter of law (CR 50(a)) on an appeal from a Board decision if the Board record contains no substantial evidence to establish an essential element of the non-moving party’s case. *See Strmich v. Dep’t of Labor & Indus.*, 31 Wn.2d 598, 198 P.2d 181 (1948).

V. SUMMARY OF THE ARGUMENT

Mr. Hagseth fails to provide a legally sufficient evidentiary basis to support his assertion that his employment for Express Personnel Services should be considered regular, continuous employment such that his wage rate should be established under RCW 51.08.178(1) instead of RCW 51.08.178(2). His only support for this assertion are his own statements that he hoped to work full-time for Adams, and that his supervisor told him he planned to hire him on full-time for Adams

Lumber. The first assertion is not supported by anyone else's testimony or the exhibits, and Mr. Vargas, his supervisor, did not testify that he made any such statement, and he did not even recall that Mr. Hagseth ever expressed a wish to become a full-time worker. In any event, this evidence is insufficient to demonstrate the factors in the *Avundes* test. Under this test, his relationship to the work was that of part-time or intermittent worker. His pattern of employment had recurring gaps and he worked sporadically, conclusively showing that his work was intermittent. For this reason, the superior court correctly granted judgment as a matter of law to the Department.

VI. ARGUMENT

A. **RCW 51.08.178(2) Applies To Set Mr. Hagseth's Wage Rate As He Is A Part-Time Or Intermittent Worker**

This case concerns the time loss calculation rate for Mr. Hagseth. RCW 51.08.178 defines "wage" for the purpose of computing monthly wages to set the time loss rate. Wage is defined as:

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week.

....

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern

....

RCW 51.08.178.

Here the superior court and Board were correct that Mr. Hagseth's rate should be set using RCW 51.08.178(2) instead of .178(1). Subsection 1 is used for workers who are "normally employed" at the time of injury. This indicates that the worker has a normal, consistent number of work days each week that can be readily determined. *See In re Pino*, BIIA Dec. 91 5072 & 92 5878, 1994 WL 144956, at *4 (1994). This can be so whether the worker is regularly employed at forty hours per week, or at

twenty hours per week. *See Id.* Subsection 2 is used for workers who are either exclusively seasonal or essentially part-time or intermittent at the time of injury. Subsection 1 is the default provision. *Avundes*, 140 Wn.2d at 290. If Mr. Hagseth is an essentially part-time or intermittent worker, a statutory twelve-month averaging period must be used to determine his monthly wage. If, on the other hand, he was not a part-time or intermittent worker within the meaning of RCW 51.08.178(2)(b), then the method as set forth in RCW 51.08.178(1) must be used to determine his monthly wage.

The Supreme Court in *Avundes* interpreted the phrase “essentially part-time or intermittent” and adopted a two-part test that looks first to the type of work being performed, and secondly, the relationship to the work being performed. *Avundes*, 140 Wn.2d at 287, 290. Even if the type of work is not essentially intermittent or part-time, RCW 51.08.178(2)(b) applies if the worker’s relationship to his employment is essentially intermittent or part-time. *Id.* at 288.⁶ To determine a worker’s relationship to his or her employment, the court considers four factors: (1) the nature of the work, (2) the worker’s intent, (3) the worker’s relation with the current employer, and (4) the worker’s work history. *Id.* at 287, 290.

⁶ The Board did not find the “type of work” prong of the test applied. *See* BR at 4. Neither did the superior court rule under this prong of the test. *See* CP at 38-41.

The *Avundes* court noted that nothing in RCW 51.08.178 requires that the work used to calculate the wage rate be the same work used to determine the worker's relation to employment, nor does the statute require that the work be characterized by the last job performed, nor that the focus be exclusively on the current work. *See Avundes*, 140 Wn.2d at 289. Rather, all the listed factors must be reviewed. *Id.*

Mr. Hagseth quotes *Id.* at 288, for the proposition that “work which requires a worker to establish serial employment should be viewed as essentially full-time.” Br. App. at 16. Mr. Hagseth omitted the rest of the quotation, which was from the Board decision in *Avundes*, in which the Board stated that “[w]ork which requires a worker to establish serial employment should be viewed as essentially full-time . . . unless rebutted by the Department Here, there was no such rebuttal” *Avundes*, 140 Wn.2d at 288 (quoting *In re Avundes (Abundes)* BIIA Dckt. 95 5344, 95 6135 & 96 0334, at *3 (1996) (internal quotation omitted)). The court said “[t]he Department has not contested this finding and we will not revisit it.” *Id.* at 288. The Supreme Court did not adopt a presumption that serial employment is full-time. The Board reached no

such conclusion in Mr. Hagseth's case, as the Department rebutted any such presumption.⁷

In *Avundes*, the complete pattern of employment showed he had full-time employment, not the mere fact of serial employment as Mr. Hagseth suggests at Br. App. at 16. The worker in *Avundes* was a general farm laborer who was injured while cutting asparagus. *Id.* at 284. He had been cutting asparagus for only 50 days. But in the previous fourteen months, he had worked 19 different jobs, working on each project until it was complete. *Id.* at 284-85. The parties stipulated that the worker intended to secure full-time work throughout the year. *Id.* at 285. On these facts, the Court held that he was not an intermittent worker. In *Avundes*, the intent was to work full-time and the worker's work history showed a consistent pattern of working or looking for work. *Id.* at 288. Mr. Hagseth's pattern of employment is vastly different.⁸

⁷ Note that the context of the court's discussion of the Board decision was looking at the first prong of the *Avundes* test (*Avundes*, 140 Wn.2d at 288), which is not at issue here. Any presumption (if one exists) that serial employment is full-time was rebutted with respect to the second prong of the test. See Part VI.B.

⁸ At Br. App. at 16, Mr. Hagseth cites the Board decision *In re Deborah Guragna (Williams)*, BIIA Dec. 90 4246, 1992 WL 117946 (1992), for the proposition that employment with a labor exchange is considered continuing in nature. This case does not stand for this proposition. It stands for the proposition that the fact that someone has works from "job to job in construction type work should [not] be considered per se part-time or intermittent work merely because there may be periods of non-work in between job assignments." *Id.* at *4. The Board looked to the type of work being performed, and secondly, the relationship of the worker to the employment to determine whether the worker was an intermittent or part-time worker. *Id.* at *2. Thus, the fact that someone is employed at a labor exchange is not determinative.

In *Avundes*, the court derived the two-part test from the Board's decision in *Pino*. *Avundes*, 140 Wn.2d at 287 (citing *Pino*, 1994 WL 144956). In *Pino*, the Board analyzed RCW 51.08.178(2), and determined that they must look to the type of work being performed, and the worker's relationship to employment. *Pino*, 1994 WL 144956 at *4. The Board also noted that other factors may be relevant to the inquiry, including the worker's intent. *Id.* at *5. However, the Board noted that the worker's intent was but one factor in the analysis, as in some cases "a worker's stated intent may be completely undercut by a historical pattern or other actions that discredit the stated intent." *Id.* at *5. Mr. Hagseth's is such a case.

B. Even When The Facts Of This Case Are Considered In A Light Most Favorable To Mr. Hagseth, He Cannot Establish That His Relationship To Employment Is Full-Time And Continuous Applying the *Avundes* Test

Under the *Avundes* test, Mr. Hagseth's relationship to employment is that of an intermittent or part-time worker. The first prong of the test "type of work" is not at issue. BR at 3-4; CP at 38-41. Even if the type of work is not essentially intermittent or part-time, RCW 51.08.178(2)(b) applies if the worker's relationship to his employment is essentially intermittent or part-time. *Avundes*, 140 Wn.2d at 288. The second prong

of the test looks to the relationship to work by looking at four factors.
Id. at 287, 290.

1. The Nature Of The Employment Was Temporary And Intermittent

The first factor is the nature of the employment. *Avundes*, 140 Wn.2d at 287, 290. The Board looked at a case similar to Mr. Hagseth's in *In re Richard Brixey*, BIIA Dckt. 02 14516, 2003 WL 22696970 (2003). Mr. Brixey characterized his work pattern as mostly full-time, but the Department set his wages under RCW 51.08.178(2). *Brixey*, 2003 WL 22696970 at *2. From November 1998 until his November 2001 industrial injury while working at a sawmill, Mr. Brixey sought work exclusively through Labor Ready, a job agency. He testified that he showed up at their office at 5:30 a.m. each workday to be assigned to jobs. *Id.* at *1. Mr. Brixey never obtained permanent employment with an employer while working for Labor Ready. *Id.* at *2.

The Board applied the *Avundes* test to Mr. Brixey and determined that the worker's type of employment⁹ was satisfied by reviewing his Employment Security records for 1998 through the second quarter of 2002. *Brixey*, 2003 WL 22696970 at *3. Those records demonstrated that Mr. Brixey's employment was essentially part-time and intermittent,

⁹ In *Brixey*, the Board analyzed the case under the first prong of the *Avundes* test, type of work. *Brixey*, 2003 WL 22696970 at *3. This analysis is very similar to the "nature of employment" test under the second prong of the *Avundes* test.

providing inconsistent work hours and an unpredictable sporadic work pattern. *Id.* at *3. The Board noted that Mr. Brixey chose to limit his employment to what he could obtain through Labor Ready, resulting in essentially part-time and intermittent employment. *Id.* at *1-3. The same may be said of Mr. Hagseth.

In his current assignment, the nature of Mr. Hagseth's work was a temporary assignment as a lumber grader trainee to a lumber mill. Even for the five weeks of his employment at Adams, Mr. Hagseth did not average forty hours a week.

Like the worker in *Brixey*, Mr. Hagseth's work pattern for Express Personnel Services demonstrates a sporadic work pattern that reveals the nature of the work was essentially part-time or intermittent, as distinguished from the serial employment in *Avundes*. His overall work as documented in his pay records for Express Personnel Services was work done on a fluctuating, temporary, sporadic basis. *See* BR Ex. 2; BR Ex. 3.

The fact that Mr. Hagseth had worked off and on at Express Personnel Services for several years does not necessarily make him a permanent employee, but even if he was permanent this does not mean that his work was not intermittent or part-time, as Mr. Hagseth suggests at Br. App. at 16. The facts show here that he was performing temporary work on a sporadic basis.

2. Mr. Hagseth Did Not Manifest An Intent To Work Full-Time

The second factor to look at is the worker's intent. *Avundes*, 140 Wn.2d at 287, 290. Mr. Hagseth testified that he hoped to be employed full-time (BR Hagseth at 6), but his testimony is not supported by any other evidence in this record. In *Watson v. Department of Labor & Industries*, 133 Wn. App. 903, 138 P.3d 177 (2006), the court relied upon Mr. Watson's regular receipt of unemployment compensation as un rebutted proof that he had sought, but not found, employment during his off-season from working as a golf course groundskeeper. Mr. Hagseth has no such showing, having neither asked for nor received unemployment benefits from 2000 to 2009. BR Ex. 1. Nor did Mr. Hagseth offer any testimony of job searches beyond his employment with Express Personnel Services. Thus, although the *Watson* court presumed an ongoing search for regular employment in that case, no such presumption is available to Mr. Hagseth.

Mr. Hagseth did not testify that he regularly looked for full-time, permanent employment outside of his employment with Express Personnel Services. Rather, he testified that he was always hoping that an employer to whom Express Personnel Services sent him would hire him, and that his

only employment in 2004 was through Express Personnel Services.
BR Hagseth at 5-6.

3. Mr. Hagseth's Relationship to the Current Employment Was That Of A Temporary Assignment Where His Hours Fluctuated

The third factor to look at is the worker's relationship with the current employer. *Avundes*, 140 Wn.2d at 287, 290. Mr. Hagseth's relationship to his employment at Adams Lumber was that of a temporary assignment where his hours fluctuated. According to Mr. Vargas, Mr. Hagseth never met Adams Lumber's requirements, and there was no intent by the employer to hire Mr. Hagseth as a permanent worker. BR Vargas at 22-24. Mr. Vargas did recommend Mr. Hagseth's Express Personnel Services co-worker Ricardo as a permanent Adams Lumber hire, but made no such recommendation for Mr. Hagseth. BR Vargas at 22, 24, 33. Adams Lumber had expressed its dissatisfaction with Mr. Hagseth's performance to Express Personnel Services before he was injured. BR Rayan at 53; BR Ex. 2.

Mr. Hagseth argues that he has a "consistent, full time relationship with his current employer, Express Personnel." Br. App. at 17. This is not the case. Mr. Hagseth's relationship with Express Personnel Services was certainly long-standing, reaching back to 1991. However, the relationship cannot be considered that of a continuous, full-time employee

given his record there. There were years when he did not work for Express Personnel Services at all, and many years when he worked a minimal number of hours for the company. BR Rayan at 38-42; BR Ex. 2, 3. This included the year 2004 where he worked only 218 hours, spread out sporadically through the year. BR Ex. 1; BR Ex. 3. No client of Express Personnel Services has ever offered Mr. Hagseth a permanent job, and more than one expressed dissatisfaction with his performance. BR Rayan at 43-44; BR Ex. 2, 3.

4. Mr. Hagseth's Work History Is That Of A Part-Time Or Intermittent Worker

The final factor to consider is the worker's work history. *Avundes*, 140 Wn.2d at 287, 290. Mr. Hagseth's history is that of an intermittent and/or part-time worker. From 2000 to 2004, he worked significantly less than full-time, and does not appear to have been a permanent hire in any employment. BR Ex. 1. Assuming that 2000 hours is full-time employment, Mr. Hagseth's work pattern, expressed as a percentage of full time employment, can be shown as follows:

in 2000 he worked 41 percent,
in 2001 he worked 39 percent,
in 2002 he worked 54 percent,
in 2003 he worked 51 percent, and
in 2004 he worked 11 percent.

Even at his job of injury with Adams, Mr. Hagseth averaged 27.3 hours a week for the five weeks he was employed before his injury.

Mr. Hagseth has failed to make a prima facie case and provide a “legally sufficient evidentiary basis” for a reasonable jury to find for him in his appeal. CR 50(a)(1). No credible evidence supports Mr. Hagseth’s assertion that he had any reasonable expectation to be hired on as a permanent worker with Adams Lumber, or that his supervisor has assured him that he was going to be hired. Even assuming that Mr. Hagseth really intended to be hired on permanently at Adams Lumber, the rest of the *Avundes* factors overwhelmingly demonstrate that he is a part-time or intermittent worker as his stated intent is “completely undercut by a historical pattern or other actions that discredit the stated intent.” See *Pino*, 1994 WL 144956, at *5. As a matter of law, Mr. Hagseth failed to make a prima facie case that the Board’s order is incorrect, and failed to demonstrate a right to relief. The superior court’s decision should be affirmed as a matter of law.

C. Under The Definition Of Intermittent, RCW 51.08.178(2) Applies to Mr. Hagseth

Mr. Hagseth is also an intermittent worker under the definition of “intermittent” developed by case law. Intermittent employment is defined as “not regular or continuous in the future. It may be full-time, extra-time

or part-time and has definite starting and stopping points with recurring time gaps.” *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 266, 258 P.3d 87 (2011) (quoting *School District No. 410 v. Minturn*, 83 Wn. App. 1, 6, 920 P.2d 601 (1996) (internal quotation omitted)).

All four of the exhibits admitted in this matter attest to the intermittent, irregular, and part-time nature of Mr. Hagseth’s connection to employment with Adams Lumber, with Express Personnel Services, and with employment of any kind. His records show recurring time gaps, with definite starting and stopping periods. In 2004, his employment was exclusively through Express Personnel Services, and totaled 218 hours. BR Ex. 1. That is not even half-time employment for a single quarter, let alone full-time and continuous for an entire year. If he were working eight-hour days, Mr. Hagseth worked fewer than 28 days in the entire year of 2004. BR Ex. 1, 2, 3, 4. Express Personnel Services’ records indicate that Mr. Hagseth worked approximately 45 days in 2004, which means that his work days averaged fewer than five hours per day to make up the 218 reported hours of work. BR Ex. 1, 3. This is the pattern of a part-time or intermittent worker.

Although Mr. Hagseth asserts that his employment history with Express Personnel Services was permanent, regular, and full-time (Br. App. at 18), review of his actual hours worked does not support his

assertion. BR Ex. 1, 3. While Ms. Rayan described Mr. Hagseth's 2003 work history as "pretty well regular" (BR Rayan at 42), his actual work that year was not regular or full time. BR Ex. 1, 3. In 2003, Mr. Hagseth worked a total of 1,017 hours, all of them through Express Personnel Services, over eleven assignments with six employers, three of whom were dissatisfied with his work. BR Ex. 3. Ms. Rayan expressed no opinion as to whether Mr. Hagseth was seeking full-time employment. BR Rayan at 44. Instead, she noted generically that she thought it would be the desire of anyone to be a permanent employee, but she did not recall hearing Mr. Hagseth say so. BR Rayan at 44.

D. The Rule Of Liberal Construction Does Not Apply To This Case

Hagseth relies on the rule of liberal construction. Br. App. at 7-11. The rule of liberal construction in workers' compensation cases states that doubts about the meaning of the Act are to be liberally construed in favor of the injured worker. *See Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001); RCW 51.12.010. Only if the statute is ambiguous does the court employ a liberal construction to it for the benefit of the injured worker. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 472 n.7, 474, 843 P.2d 1056 (1993). The liberal construction rule does not dispense with the requirement that the plaintiff must produce competent

evidence to prove the facts upon which it relies to substantiate entitlement to the benefits sought. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949). That is, while the court should liberally construe the Industrial Insurance Act in favor of "those who come within its terms, persons who claim rights there under should be held to strict proof of their right to receive benefits under the act." *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); RCW 51.12.010.

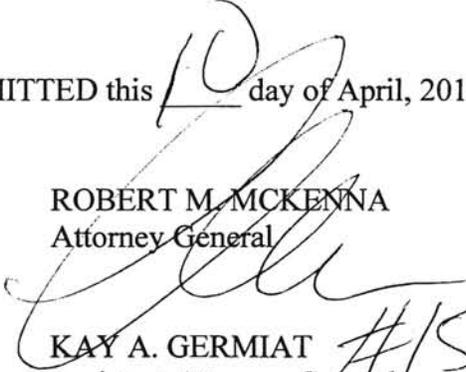
Here the issue is whether Mr. Hagseth was a normally employed worker under RCW 51.08.178(1) or a part-time or intermittent worker under RCW 51.08.178(2). The facts of a case are not liberally construed, and those seeking the benefit of the Act must present strict proof of their entitlement to benefits. *Cyr*, 47 Wn.2d at 97. Mr. Hagseth failed to do this and this Court should affirm the superior court judgment as a matter of law.

VII. CONCLUSION

The Department respectfully requests that this Court affirm the superior court order dated September 9, 2011, for the reasons stated above.¹⁰

RESPECTFULLY SUBMITTED this 10 day of April, 2012.

ROBERT M. MCKENNA
Attorney General


KAY A. GERMIAT #15/34
Assistant Attorney General
WSBA No. 18532
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
(253) 593-5243

¹⁰ The Department agrees with Mr. Hagseth at Br. App. at 21 that if the superior court's decision is reversed, the remedy is to remand to the superior court for trial.

No. 42680-3-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

BRODERICK HAGSETH,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
MAILING

DATED at Tacoma, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Respondent's Brief counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Karla Rood
Vail & Cross-Euteneier & Assoc.
PO Box 5707
Tacoma, WA 98415-0707

DATED this 10th day of April, 2012.

TRACY LANE-PATTON
Legal Assistant